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Akhbar Jafarisshonestani Mohamad v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–187–07 OF 2012 (IRN)
BALIA YUSOF, AZIAH ALI AND ZAKARIA SAM JJCA
10 JUNE 2014

Criminal Law — Dangerous drugs — Trafficking — Trafficking in 2,032.8g of methamphetamine — Appeal against conviction and sentence — Dangerous drugs found in bag carried by appellant at airport — Defence of innocent carrier — Trial judge not giving reason for totally rejecting evidence of defence witness — Trial judge erring in assessing demeanour and credibility of witness — Trial judge failing to appraise and appreciate evidence of defence witness — Failure of prosecution to rebut and negative defence advanced by appellant — Defence raising reasonable doubt on prosecution case — Whether conviction safe

The appellant was seen pushing a trolley with two bags at the Bayan Lepas International Airport, Penang. He was stopped and upon scanning one of his bags ('exh P8), a dark coloured backpack ('exh P10') was found inside. Upon cutting open the inner lining of P10, a plastic packet containing 2,032.8g of methamphetamine was found. The appellant and the bags were then taken to the customs narcotic office at Butterworth where SP6 marked all the exhibits and a 'semak' list was prepared by SP7. The appellant was charged with an offence of trafficking in dangerous drugs. The appellant in his defence had claimed that exh P8 belonged to one Naser Sadeghi ('Naser'). The baggage tags of both were in his name. According to the appellant, the baggages were checked in by Naser because the appellant did not speak English and his travel documents were with Naser. Upon arrival at the airport, Naser and the appellant had come out from the plane and went to the carousel to collect their baggages. Their bags were placed on the same trolley and the appellant had pushed the trolley to the exit point and he was stopped by a customs officer. Abolfazi Yavari ('SD2') who claimed to be Naser's friend, testified that exh P10 belong to SD2. SD2 claimed that he had left exhibit P10 in Naser's car when they went mountain climbing in late 2010. Mohammadesmaeil (SD3), the appellant's elder brother, testified that he had earlier met Naser who had exh P8 with him. Ong Swee Ming (SD4), testified that around the end of 2010, he had met Naser regarding the sale of some pistachio nuts and dates. The learned trial judge ('judge') found the evidence of SD2 to be doubtful while the evidence of SD4 was completely ruled out after having found that SD4 was not a witness of truth. The judge so concluded after 'looking at the demeanour of SD4 in the witness box'. The judge also disbelieved the appellant's story and found both bags P8 and P9 to be belonging to him. The judge however did not make any finding on the evidence of SD3. In conclusion, the judge found the appellant's

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defence to be intertwined with falsehood, concoction and half truths. The appellant was thus convicted for an offence of trafficking and was sentenced to the mandatory death sentence. The appellant appealed against the conviction and sentence. With regards the identity of the drugs, the appellant claimed that there was a break in the chain of evidence. According to the appellant, upon discovery of the drugs at the airport, SP8 instructed En Tajuddin and En Yuslizan ('customs officers') to escort the appellant together with exhibit P10 containing the drugs to the customs office at Butterworth from the airport. It was only at the customs office that the exhibits were marked by SP6. The appellant contended that in the circumstances, both the customs officers should have been called by the prosecution to prove the chain of evidence in respect of the drugs that were discovered at the airport were the same that were sent to the chemist. The appellant also challenged the finding of the judge that the appellant had knowledge of the drugs. It was submitted that the inference of knowledge drawn by the judge could not be supported by the evidence tendered. It was submitted that the finding was based purely on assumption and/or personal opinion and not on proved facts.

Held, allowing the appeal and acquitting and discharging the appellant:

(1) With regards the non-calling of the customs officers, it was not necessary to call everybody involved in the case. The trial judge had considered the evidence from the airport till the marking of exhibits by SP6 in the presence of the appellant. That completed the chain of evidence relating to the drugs from the airport to the Chemist Department. There was no break in the chain of evidence. The court was satisfied that the judge had drawn inferences from proved facts and not from his own assumptions and/or personal knowledge (see paras 16–21 & 25).

(2) The judge had not given any reason why the evidence of SD4 was totally rejected. An impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. It is trite that even if a witness is found to be lying on one or two points, his evidence should not be totally rejected. At most, his evidence must be treated with caution (see paras 46–48).

(3) There was nothing in the appeal records, primarily in the ground of judgment in respect of the appraisal of the evidence of SD4 and SD3. The judge had erred in failing to do so. Failure of a judge to appraise and appreciate the evidence of a witness is a misdirection. It must stand to correction by the appellate tribunal (see para 52).

(4) The obligation of a trial judge to deliver reasons which sets out the basis of his decision in accepting or rejecting the evidence is mandatory. Failure

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to do so is a serious misdirection. The judge had failed to carry out a proper evaluation of the defence evidence let alone a critical analysis of the same (see paras 54 & 57).

(5) The defence of the appellant about the bag P8 containing the bag P10 with the drugs hidden inside to be belonging to Naser was made known to the prosecution even as early as at the investigation stage. Naser was not a fictitious character and his existence was certainly not a figment of the appellant's imagination. This, was a serious error on the part of the judge. The suggestion by the defence had indeed crystallised into evidence during the defence case (see paras 58 & 60).

(6) The prosecution had failed to introduce any evidence either during the prosecution case or by way of rebuttal evidence after the defence case to rebut and negative the defence advanced by the appellant. Hence, the prosecution could not be said to have proven their case beyond reasonable doubt. The appellant ought to be given the advantage of having raised a reasonable doubt to the prosecution's case and be entitled to earn an acquittal. Thus, the appellant's conviction was not safe (see paras 63–64).

[Bahasa Malaysia summary

Perayu dilihat menolak troli dengan dua beg di Lapangan Terbang Antarabangsa Bayan, Pulau Pinang. Dia telah ditahan dan setelah diimbas salah satu daripada begnya ('eksh P8'), satu beg sandang berwarna gelap ('eksh P10') telah dijumpai di dalamnya. Setelah memotong bahagian lapisan dalaman P10, sebungkus paket plastik mengandungi 2,032.8g methamphetamine telah ditemui. Perayu dan beg-beg itu kemudian telah dibawa ke Pejabat Kastam Narkotik di Butterworth di mana SP6 telah menandakan semua ekshibit-ekshibit itu dan senarai semak telah disediakan oleh SP7. Perayu telah dituduh kerana kesalahan mengedar dadah berbahaya. Perayu dalam pembelaannya mendakwa bahawa ekshibit P8 milik Naser Sadeghi ('Naser'). Teg kedua-dua bagasi itu adalah atas namanya. Menurut perayu, bagasi-bagasi itu telah diperiksa oleh Naser. Sejurus tiba di lapangan terbang itu, Naser dan perayu telah keluar dari pesawat dan pergi ke karousel untuk mengambil bagasi-bagasi mereka. Beg-beg mereka telah diletakkan atas troli yang sama dan perayu telah menolak troli itu ke pintu keluar dan dia telah ditahan oleh pegawai kastam. Abolfazi Yavari (SD2) yang mendakwa kawan Naser, telah memberi keterangan bahawa eksh P10 adalah milik SD2. SD2 mendakwa bahawa dia telah meninggalkan eksh P10 dalam kereta Naser apabila mereka pergi memanjat bukit penghujung tahun 2010. Mohammadesmaeil ('SD3'), abang perayu, telah memberi keterangan bahawa dia telah terlebih dahulu berjumpa dengan Naser yang mempunyai eksh P8 dengannya. Ong Swee Ming ('SD4'), telah memberi keterangan bahawa sekitar penghujung 2010, dia telah berjumpa Naser berkaitan jualan kacang pistachio dan kurma. Hakim yang bijaksana ('hakim tersebut') mendapati

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keterangan SD2 agak meragukan manakala keterangan SD4 patut ditolak setelah mendapati SD4 bukan saksi yang bercakap benar. Hakim tersebut membuat keputusan selepas 'looking at the demeanour of SD4 in the witness box'. Hakim tersebut juga tidak mempercayai cerita perayu dan mendapati kedua-dua beg P8 dan P9 adalah miliknya. Hakim tersebut bagaimanapun tidak membuat apa-apa penemuan berdasarkan keterangan SD3. Kesimpulannya, hakim tersebut mendapati pembelaan perayu saling berkait dengan penipuan, rekaan dan separuh benar. Perayu oleh itu disabitkan kerana kesalahan pengedaran dan dijatuhkan hukuman mati mandatori. Perayu merayu terhadap sabitan dan hukuman. Berhubung identiti dadah itu, perayu mendakwa bahawa rantaian keterangan terputus. Menurut perayu, setelah penemuan dadah itu di lapangan terbang, SP8 telah mengarahkan En Tajuddin dan En Yuslizan ('pegawai-pegawai kastam') mengiringi perayu bersama eksh P10 yang mengandungi dadah itu ke pejabat kastam di Butterworth dari lapangan terbang itu. Hanya di pejabat kastam ekshibit-ekshibit itu ditanda oleh SP6. Perayu berhujah bahawa dalam keadaan itu, kedua-dua pegawai kastam sepatutnya dipanggil oleh pendakwaan untuk membuktikan rantaian keterangan berkaitan dadah yang ditemui di lapangan terbang adalah sama dengan yang dihantar kepada ahli kimia. Perayu juga mencabar penemuan hakim tersebut bahawa perayu mempunyai pengetahuan tentang dadah itu. Adalah dihujahkan bahawa inferens pengetahuan yang dibuat oleh hakim tersebut tidak boleh disokong oleh keterangan yang dikemukakan. Adalah dihujahkan bahawa penemuan itu adalah berdasarkan andaian semata-mata dan/atau pendapat peribadi dan bukan fakta yang dibuktikan.

Diputuskan, membenarkan rayuan dan melepaskan dan membebaskan perayu:

(1) Berhubung pegawai-pegawai kastam yang tidak dipanggil, tidak perlu memanggil semua yang terlibat dalam kes. Hakim perbicaraan telah mempertimbangkan keterangan daripada lapangan terbang sehingga penandaan ekshibit oleh SP6 di hadapan perayu. Itu telah menyempurnakan rantaian keterangan berkaitan dadah itu dari lapangan terbang ke Jabatan Kimia. Rantaian keterangan tidak terputus. Mahkamah berpuas hati bahawa hakim perbicaraan tersbeut telah membuat inferens berdasarkan faka yang dibuktikan dan bukan daripada andaiannya sendiri dan/atau pengetahuan peribadinya (lihat perenggan 17–21 & 25).

(2) Hakim tersebut tidak memberikan apa-apa sebab kenapa keterangan SD4 terus ditolak. Tanggapan berhubung sikap saksi tidak patut digunakan oleh hakim perbicaraan tanpa mengujinya dengan keseluruhan keterangan saksi yang dipersoalkan. Adalah undang-undang tetap meskipun saksi itu didapati berbohong tentang satu dua perkara, keterangannya tidak sepatutnya ditolak sepenuhnya.

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Sekurang-kurangnya, keterangannya harus digunakan dengan berhati-hati (lihat perenggan 46–48).

(3) Tiada apa-apa dalam rekod rayuan, terutamanya dalam alasan penghakiman berkaitan penilaian keterangan SD4 dan SD3. Hakim tersebut terkhilaf kerana gagal berbuat demikian. Kegagalan hakim untuk menilai dan memahami keterangan saksi adalah satu salah arah. Ia perlu diperbetulkan oleh tribunal rayuan (lihat perenggan 52).

(4) Tanggungjawab hakim perbicaraan untuk menyampaikan sebab-sebab yang menyatakan asas keputusannya beliau kerana menerima atau menolak keterangan adalah mandatori. Kegagalan untuk berbuat demikian adalah suatu salah arah yang serius. Hakim tersebut telah gagal untuk melaksanakan penilaian yang wajar berhubung keterangan pembelaan apatah lagi memberi analisis kritikal berhubungnya (lihat perenggan 54 & 57).

(5) Pembelaan perayu tentang beg P8 yang mengandungi beg P10 dengan dadah tersembunyi dalamnya sebagai milik Naser telah diberitahu kepada pendakwaan di awal peringkat penyiasatan lagi. Naser bukan orang rekaan dan kewujudannya memang bukan rekaan imaginasi perayu. Ini, adalah kekhilafan serius di pihak hakim tersebut. Cadangan oleh pembelaan memang jelas menjadi keterangan semasa kes pembelaan (lihat perenggan 58 & 60).

(6) Pendakwaan telah gagal untuk mengemukakan apa-apa keterangan sama ada semasa kes pendakwaan atau melalui keterangan pematahan selepas kes pembelaan untuk mematah dan menidakkan pembelaan dikemukakan oleh perayu. Justeru, pendakwaan tidak boleh dikatakan telah membuktikan kes melampaui keraguan munasabah. Perayu patut diberikan kelebihan kerana telah menimbulkan keraguan munasabah atas kes pendakwaan dan berhak diberikan pembebasan. Oleh itu, sabitan perayu tidak selamat (lihat perenggan 63–64).]

Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 763–910.

Cases referred to

Boonsom Bonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62, CA (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 4 CLJ 551, CA (refd)
Jones v Dunkel (1959) 101 CLR 298 (refd)
Khoon Chye Hin v PP [1961] 1 MLJ 105b, CA (refd)
Lee Ing Ching @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

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Mohamad Radhi Yaakob v PP [1991] 3 MLJ 169; [1991] 1 CLJ (Rep) 311, SC (refd)
Muklis bin Jaafar v PP [2010] 7 CLJ 696, CA (refd)
Muniandy & Ors v PP 1966 1 MLJ 257; [1966] 1 LNS 110, FC (refd)
Murugiah v PP [1941] 1 MLJ 176 (refd)
Nasrul Anuar bin Abd Samad v PP [2005] 1 MLJ 619; [2005] 1 AMR, HC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)
R ex v Low Toh Cheng [1941] 1 MLJ 1 (refd)
Su Ah Ping v PP [1979] 1 LNS 100, FC (refd)
Woolmington v DPP [1935] AC 462, HL (refd)
Yuill v Yuill [1945] 1 All ER 183 (refd)
Zaifull bin Muhammad v PP and another appeal [2013] 2 MLJ 348, FC (refd)

Legislation referred to

Criminal Procedure Code ss 182A, 271
Dangerous Drugs Act 1952

Appeal from: Criminal Appeal No 45–31 of 2011 (High Court, Pulau Pinang)

Gooi Soon Seng (Gooi & Azura) for the appellant.
Tengku Intan Suraya (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Balia Yusof JCA:

[1] The appellant was charged and convicted for an offence of trafficking in dangerous drugs to wit 2032.8g of methamphetamine. The offence was alleged to have been committed at the arrival hall of the Bayan Lepas International Airport, Penang ('the airport'). He was found guilty and convicted by the High Court judge in Penang and sentenced to the mandatory death sentence. He now appeals against the said conviction and sentence.

[2] The relevant facts of the case against the appellant states that at about 11am on 9 January 2011 he was seen pushing a trolley with two bags at the green lane of the customs check point at the Bayan Lepas International Airport, Penang. SP3, who was on duty, stopped him and examined the baggage tag. SP3 found that the appellant was on an international flight from Doha to Kuala Lumpur. The appellant was directed towards the scanning machine to have his baggage scanned. Another customs officer, SP4 did the scanning on the two bags (marked as exhs P8 and P9). SP4 noticed some suspicious looking images on exh P8.

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[3] SP4 then undertook to physically examine exh P8 and found it to contain clothings and a dark coloured backpack with a brand 'Adventure' (marked as exh P10). P10 was found to contain some clothings, books and magazines.

[4] Having emptied P10 of its content, SP4 put it in the scanning machine and still found the auspicious looking image to be there. The matter was then referred to her seniors.

[5] About an hour later, SP6, SP7 and SP8 came over to the airport. By using sign language, SP6 requested for copies of the baggage tags from the appellant. The appellant then took out two baggage tags, P25A and P25B from a pocket of his vest. On comparison with the serial numbers of the baggage tags, they matched with the serial numbers on the two bags P8 and P9. The appellant's name was written on both of the baggage tags. Referring to the bags, P8 and P10, SP6 asked the appellant in English 'is this your bag?'. The appellant replied, 'no English'.

[6] SP6 then cut open the inner lining of P10 and found a cardboard concealed in between the lining at the back wall of P10. Upon cutting the top part of the cardboard, SP6 found a translucent plastic packet containing white powdery crystals. A screening test was carried out on the white crystals substance and it was positive for methamphetamine.

[7] The appellant and the bags together with their respect contents were then taken to the customs narcotic office at Butterworth. At the narcotics office, SP6 marked all the exhibit and a 'semak' list was prepared by SP7.

[8] A second screening test was conducted by SP6 on the white powdery crystals and again it was confirmed to be methamphetamine. The suspected drugs were weighed and its gross weight was found to be 3.5kg.

[9] Subsequently, the exhibits were sent to the Chemistry Department at Penang for analysis and the government chemist, SP5 confirmed the white powder crystals substance to be methamphetamine, a dangerous drugs listed in the Dangerous Drugs Act 1952, with a net weight of 2032.8g.

[10] Two grounds of appeal were canvassed before us, namely:

(a) identity of the drugs; and

(b) the defence had rebutted knowledge.

[11] On the identity of the drugs, learned counsel for the appellant

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submitted that there is a discrepancy on the gross weight and there is also a break in the chain of evidence. There was an increase of 280g in the weight as evident from the testimony of SP6 and SP5. SP6, the customs officer stated 3.5kg while SP5, the government chemist stated 3780g. There was no explanation by the prosecution as to this discrepancy.

[12] In his findings, the learned trial judge made the following conclusion as to the discrepancy at pp 38–39 of the *rekod rayuan Jilid* 1:

> As can be seen, the gross weight of the drugs stated by SP6 is 3,500 grammes which is inclusive of the cardboard and presumably the plastic package as well. The weight of the cardboard per se is not known.
>
> Whereas the gross weight of the drugs stated by SP5 is 3,030 grammes (minus 750 grammes being the weight of the plastic package). There is, therefore, the gross weight of the drugs obtained by SP5 is increased by 280 grammes as contended by learned counsel. It is inaccurate or inconclusive. The weight of the cardboard and the plastic package as weighed by the customs are unknown and not taken into account.

[13] It is apparent that the learned trial judge was of the view that the 280g difference in the gross weight of the impugned drugs is inaccurate and inconclusive as the weight of the cardboard and the plastic package were not known. This is precisely what the appellant is contending. Since the weight of the cardboard and the plastic package is not known, the gross weight of the drugs as found by the chemist should have been lesser than the gross weight as stated by SP6, and not greater.

[14] With the discrepancy left unexplained, a reasonable doubt as to the identity of the drug has been created. Learned counsel relied on *Zaifull bin Muhammad v Public Prosecutor and another appeal* [2013] 2 MLJ 348.

[15] Coupled with the above, was the fact that upon discovery of the drugs at the airport, SP8 instructed customs officers, Encik Tajuddin and Encik Yuslizan to escort the appellant together with the exh P10 containing the drugs to the customs office at Butterworth from the airport. It was only at the customs office that the exhibit were marked by SP6.

[16] Learned counsel submitted that in the circumstances, it was of necessity that both Encik Tajuddin and Encik Yuslizan should be called by the prosecution to prove the chain of evidence in respect of the drugs that were discovered at the airport were the same that were sent to the chemist.

[17] On this issue, we agree with the trial judge that it was not necessary to call everybody involved in the case citing *Muklis bin Jaafar v Public Prosecutor*

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A [2010] 7 CLJ 696, *Su Ah Ping v Public Prosecutor* [1979] 1 LNS 100 and *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551 as authorities in support of his views.

B **[18]** In tracing the chain of evidence, the learned trial judge had considered the evidence that from the airport, both SP6 and SP7 went back to the customs office at Butterworth together with Encik Tajuddin and Encik Yuslizan and also the appellant and the exhibits. On reaching the customs office, SP6 examined the bags (exhs P8 and P9) and contemporaneously took photographs of the exhibits and marked the exhibits, while SP7 prepared the *Senarai* C *Bongkar* exh P67A–D. The markings by SP6 was done in the presence of SP8 as well as the appellant.

[19] After the markings were done, the exhibits were then handed over by SP8 to SP9 the investigating officer. That was at about 11pm on the same day. D

[20] The next day on 10 January 2011, SP9 handed over the exhibits to SP2 be kept in the strong room and on 11 January 2011, SP9 took back the exhibits and handed it over to the chemist, SP5 for analysis.

E

[21] That completed the chain of evidence relating to the drugs from the airport to the Chemist Department. We are in agreement with the learned trial judge's finding that there was no break in the chain of evidence.

F **[22]** With regard to the second ground of appeal, learned counsel for the appellant had strenuously challenged the finding of the learned trial judge that the appellant had knowledge of the drugs. It was submitted that the inference of knowledge drawn the learned trial judge cannot be supported by the evidence tendered. Learned counsel went on to submit that the finding was G based purely on assumption and/or personal opinion and not on proved facts.

[23] We must distance ourselves from the submissions made. Our perusal of the appeal records clearly shows that the learned trial judge had firstly taken into consideration the evidence of SP3, SP4 and SP9 in finding that the H appellant had custody and control of the bag, exh P10 which contained the drugs. On the inference of knowledge, from our reading of pp 24–27 of the *rekod rayuan Jilid* 1, we are unable to say otherwise but to agree with the findings made.

I **[24]** A finding made, must be on proved facts. A fact cannot be said to have been proven by assumption and/or personal opinions. Likewise, an inference must be made from proved facts. In *Nasrul Anuar bin Abd Samad v Public Prosecutor* [2005] 1 MLJ 619; [2005] 1 AMR this court had referred to *Jones v Dunkel* (1959) 101 CLR 298 wherein it was stated by Kitto J:

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> One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggest, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that case a specific event happened or a specific state of affairs existed.

[25] We are satisfied that the learned trial judge had drawn inferences from proved facts and not from his own assumptions and/or personal knowledge.

[26] In his defence, the appellant stated that he had visited Malaysia four times including the day of his arrest. The first two trips he came as a tourist and stayed in Kuala Lumpur. The third trip was in November 2010 and he came with a friend named Naser Sadeghi, also an Iranian. They stayed in Penang for two days and thereafter in Kuala Lumpur.

[27] On the fourth trip, he was arrested at the airport. He came with Naser Sadeghi. According to the appellant, the bag P9 was his, but the other bag P8, belongs to Naser Sadeghi. The baggage tags of both were in his name. The baggages were checked in by Naser Sadeghi because the appellant does not speak English and his travel documents were with Naser Sadeghi.

[28] Upon arrival at the airport, Naser Sadeghi and the appellant came out from the plane and went to the carousel to collect their baggages. The appellant's luggage arrived first. He retrieved and placed it on the trolley. Naser Sadeghi picked up his bag and placed it on the same trolley. The appellant then pushed the trolley to the exit point and he was stopped there by a customs officer.

[29] At the scanning machine, a lady customs officer examined both bags and removed everything from the bags. When the lady customs officer opened the black bag, P8, the appellant stated that for the first time he noticed a blue bag, P10 in P8. The lady customs officer spoke to him two or three times in English. The appellant only understood the word 'passport' and gave his passport to her.

[30] The appellant was then brought to a room. In the room he placed the bags on the floor and he sat on a chair next to the bags. About half an hour later, five to six men in civilian clothes entered the room. One of the men unzipped the blue bag, P9. While examining the bag, he found a red plastic packet D66 containing the appellant's passport, flight tickets and some bank cards. According to the appellant, the red plastic packet were given to the him by Naser Sadeghi while waiting for the luggage at the carousel.

[31] About three hours later, the appellant was taken away from the airport building.

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[32] The second defence witness was Abolfazi Yavari, ('SD2'). According to SP2, Naser Sadeghi is his friend for almost ten years. In late 2010, he was with Naser Sadeghi. They went mountain climbing. He left his backpack in Naser Sadeghi's car. His backpack was blue and black in colour, and identified P10 as his bag. It was written with the words 'Polar 80'.

[33] According to SD2, when he left his backpack in Naser Sadeghi's car, its inner lining was not torn. SD2 did not conceal anything in the lining of the backpack.

[34] SD2 had received a call from the appellant's brother, SD3 enquiring about the description of SD2's bag as the appellant was arrested in Malaysia with the said bag. SD2 said he did not know the appellant.

[35] The third defence witness was Mohammadesmaeil Jafarishourestani ('SD3'). SD3 was the appellant's elder brother. When the appellant wanted to come to Malaysia, SD3 sent him to the bus station. The appellant was in possession of a blue bag, P9. SD3 could recognise the bag P9 as he had purchased similar bag at the same time, but of different colour. The bag was produced and marked as D77.

[36] At the bus station, SD3 had met the appellant's friend, Naser Sadeghi who also had a black bag, P8 with him.

[37] After knowing the appellant's arrest, SD3 came to Malaysia and met the appellant at the Penang Prison. The appellant had informed SD3 that he was arrested because the backpack, P10 was found to contain drugs.

[38] On returning to Iran, SD3 met Naser Sadeghi in a police lock up in Taheran. SD3 learned that the bag belonged to SD2 (Albolfazi Yavari). He contacted SD2 and SD2 informed him that he had left his backpack in Naser Sadeghi's car on his way home from mountain climbing.

[39] The last and final witness for the defence was one Ong Swee Ming (SD4). SD4 was a local Chinese and a manager of Cathay Hotel at Leith Street, Penang. SD4 claimed that he carried on the business as a wholesaler in pistachio nuts and red dates for the past two to three years.

[40] In his testimony, SD4 said sometimes at the end of 2010, Naser Sadeghi told him that the appellant and he had pistachio nuts and dates which they could offer at a competitive price. SD4 placed an order of 200kg of the goods with them.

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[41] SD4 promised to meet the appellant and Naser Sadeghi again early the next year ie in the month of January 2011. But they never turned up.

[42] In his assessment of the defence, the learned trial judge found the evidence of SD2 claiming ownership to the backpack P10 to be doubtful while the evidence of SD4 was completely ruled out after having found that SD4 was not a witness of truth. The learned trial judge so concluded after 'looking at the demeanour of SD4 in the witness box'. The learned trial judge also disbelieved the appellant's story and found both bags P8 and P9 to be belonging to him. The learned trial judge however did not make any finding on the evidence of SD3, the appellant's brother.

[43] In conclusion, the learned trial judge found the defence of the appellant to be intertwined with falsehood, concoction and half truths.

[44] In *Mohamad Radhi Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 1 CLJ (Rep) 311 at p 171 (MLJ); pp 315–316 (CLJ) Mohd Azmi SCJ had stated:

> ... We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v Public Prosecutor* [1963] 1 MLJ 263; [1963] 1 LNS 82 go one step further before convicting the accused by giving the due consideration as to why the defence story though could not be believed did not raise a reasonable doubt on the prosecution case.

[45] Upon a close scrutiny of the learned trial judge's judgment, we are of the considered view that His Lordship had failed to reason out why the defence has failed to raise a reasonable doubt or rebutted the presumption.

[46] We are always mindful that it is the prerogative of the trial judge to believe a witness or otherwise, for he has the advantage of hearing and seeing the witness. We, at the appellate stage have not, and will always be slow to interfere on this aspect. Other than saying 'looking at the demeanour of SD4 in the witness box', the learned trial judge had not given any reason why the evidence of SD4 was totally rejected.

[47] An impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question (per Lord Green MR in *Yuill v Yuill* [1945] 1 All ER 183 referred to by the Federal Court in *Muniandy & Ors v Public Prosecutor* 1966 1 MLJ 257; [1966] 1 LNS 110.

[48] It is trite that even if a witness is found to be lying on one or two points,

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his evidence should not be totally rejected. At most, his evidence must be treated with caution (*Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105b).

[49] We are left in a doubt as to why the evidence of SD4 had been ruled out and what aspect of his demeanour had affected the learned trial judge's mind. We had perused the appeal records, in particular the notes of evidence and we failed to find any notation by the learned trial judge as to his observation on the demeanour of this witness while giving evidence.

[50] With regard to the issue of demeanour of witnesses, reference should also be made to the case of *R ex v Low Toh Cheng* [1941] 1 MLJ 1 where Terrel Ag CJ held at p 2:

> A Magistrate is entitled to disbelieve a witness and usually gives reasons for the opinion which he has formed, but a general reference to the demeanour of witnesses, without condescending to any particulars, gives rise to the suspicion that an attempt is being made to bolster up a verdict which is contrary not only to the weight of evidence but to the probabilities, and which could not be supported on a detailed examination of evidence.

[51] Further, s 271 of the Criminal Procedure Code which provides for the presiding judge to record such remarks as may be necessary or material respecting the demeanour of the witness whilst under examination was not complied with.

[52] We did not find anything in the appeal records, primarily in his ground of judgment in respect of the appraisal of the evidence of SD4 and also SD3, the appellant's brother. It was an error on the part of the learned trial judge in failing to do so. Failure of a judge to appraise and appreciate the evidence of a witness is a misdirection (*Lee Ing Ching @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97, *Boonsom Bonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62). It must stand to correction by the appellate tribunal. It has also been said that trial judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness.

[53] The Federal Court in *Lee Ing Ching v Gan Yook Chin* had stated:

> We must also test the evidence of a particular witness against the probabilities of the case. A trier of facts who makes finding based purely upon the demeanour of a witness without undertaking a critical analysis of that witness's evidence run the risk of having his findings corrected on appeal.

[54] We would add that the obligation of a trial judge to deliver reasons which sets out the basis of his decision in accepting or rejecting the evidence is mandatory. Failure to do so is a serious misdirection.

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[55] Home J had observed in *Murugiah v Public Prosecutor* [1941] 1 MLJ 176 that the magistrates do not comply with s 307(iii) of the Criminal Procedure Code which requires them to give the 'Grounds of Decision' by stating 'I believe the evidence of the prosecution ... I believe the evidence of the accused.' And went on further to say:

> I think the Magistrate should state, except in the simplest of cases and they usually are not the subject of appeal, the reasons why he believed or disbelieve the evidence in question.

[56] An appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion reached by the trial judge should stand. We are at the same time mindful of the fact that this jurisdiction has to be exercised with caution.

[57] Having these principles in mind, it is our considered view that the learned trial judge had failed to carry out a proper evaluation of the defence evidence let alone a critical analysis of the same.

[58] The defence of the appellant about the bag P8 containing the bag P10 with the drugs hidden inside to be belonging to Naser Sadeghi was made known to the prosecution even as early as at the investigation stage. It was made known to SP9 the investigating officer at the time when the appellant made a statement to the investigating authorities. In his evidence during cross-examination, SP9 admitted that the appellant did tell him that both P8 and P10 belong to a friend who came along with him, and it was Naser Sadeghi.

[59] Naser Sadeghi was not a fictitious character and his existence was certainly not a figment of the appellant's imagination. The flight manifest (exh P73c) was tendered by the prosecution. The learned trial judge however held:

> The existence of Naser Sadeghi is an assertion or suggestion made by the defence in cross-examination which is disagreed by the prosecution. Therefore the suggestions remain as suggestions or contentions and it has not crystallised into evidence. Mere suggestions by the learned counsel do not amount to evidence by the fact suggested: See *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1.

[60] This, we hold is a serious error on the part of the learned trial judge. The suggestion by the defence had indeed crystallised into evidence during the defence case.

[61] The burden on the prosecution is clearly spelt out in s 182A of the Criminal Procedure Code which is a restatement of the common law position as formulated in the oft quoted case of *Woolmington v DPP* [1935] AC 462

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where at pp 481–482 Lord Sankey LC had expressed the following:

> Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners' guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

[62] It is trite law that the burden of negating the defence raised by the accused person rests on the prosecution during the prosecution's case, or in special and exceptional circumstances, after the defence case by way of rebuttal evidence, so that a case beyond any reasonable doubt against the accused person can be said to have been proven by the prosecution. As per Augustine Paul J (as he then was) in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649 at p 729–730 (MLJ); p 675 (CLJ):

> ... the prosecution is expected to negative in its case in chief the explanations that the defence could be expected to advance in answer to the allegations against it (see *Evidence: Proof and Practice* by Graham Roberts 1 Ed P 376) ... it would have been prudent for the prosecution to adduce such evidence in the course of its case as is reasonably available to it to rebut the defence suggested because the legal burden on the prosecution does not end once it has made out a prima facie case ...

and at p 731 (MLJ); p 676 (CLJ), His Lordship went on to say:

> Once the party who bears the evidential burden has discharged it by adducing evidence sufficient to justify consideration of a particular issue, it becomes necessary for the party bearing the legal burden on that issue, the proponent, to persuade the trier of fact that it should be decided in his favour.

[63] We found the prosecution had failed to introduce any evidence either during the prosecution's case or by way of rebuttal evidence after the defence case to rebut and negative the defence advanced by the appellant. In this instance, the prosecution cannot be said to have proven their case beyond reasonable doubt. The appellant ought to be given the advantage of having raised a reasonable doubt to the prosecution's case and be entitled to earn an acquittal.

[64] In the upshot, we are of the considered view that the conviction of the appellant is not safe. We unanimously allowed the appeal and the conviction and sentence passed by the High Court is set aside. The appellant is acquitted and discharged.

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Appeal allowed and appellant acquitted and discharged.

Reported by Kanesh Sundrum